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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MYLYN C. JOHNSON,

Defendant and Appellant.

B266764

(Los Angeles County  
Super. Ct. No. MA059058)

APPEAL from a judgment of the Superior Court of Los Angeles County. Christopher G. Estes, Judge. Affirmed.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan J. Kline and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

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In a previous appeal, this court reversed five of defendant Mylyn Johnson's convictions for violations of Penal Code section 647, subdivision (j)(2).<sup>1</sup> (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1436.) Section 647, subdivision (j)(2) criminalizes the act of using a concealed device to film or photograph an "identifiable person" under or through that person's clothing so as to view the person's body or undergarments, for sexual gratification, under circumstances in which the person has a reasonable expectation of privacy. In the first appeal, we concluded prejudicial instructional error regarding the definition of "identifiable" required reversal on five counts. Following a second trial, a jury again found defendant guilty on those five counts alleging section 647, subdivision (j)(2) violations.

On appeal, defendant contends he received ineffective assistance of counsel due to his counsel's concession during closing argument that the evidence established the victims were "identifiable." Defendant further argues the trial court erred in admitting evidence he committed sexual battery and false imprisonment, crimes no longer at issue in the second trial. We affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On March 16, 2013, security guard Darryl Robinson was working at a Target store in Lancaster. Acting on a report from two customers, Andrea and Raquel M., Robinson located defendant using the store's surveillance system. As Robinson watched through the surveillance cameras, defendant followed a woman, walked behind her, stooped down with a cell phone or

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

other device, and took a picture under the woman's dress. Robinson called police. He later gave police copies of the surveillance videos for the time period he had observed, and surveillance videos depicting defendant recording Andrea and Raquel.

Los Angeles County Sheriff's Department Detective Scott Woods responded to Robinson's call on March 16, 2013. When Woods and Robinson located defendant, he was carrying a cell phone and a tablet computer. Defendant admitted he had been inside Target and that he had taken pictures of women. He admitted he did not have the women's permission to take the pictures. Woods later arrested and searched defendant. In the search, Woods discovered an additional cell phone. While defendant was in the back of Woods's patrol car, Andrea M. approached and said "something to the effect of either, 'Is that him?' or 'We wanted to make sure you got him.'" Woods asked, "Who?" Andrea answered "something to the effect of, 'The guy that was taking the pictures.'" From the back seat of the car, defendant said: "'Woods, tell them I'm sorry.'" Later, defendant admitted he went into Target intending to film. He denied engaging in similar conduct before. Defendant told Woods he had been in Target only five minutes and had taken pictures of only one woman.

Los Angeles County Sheriff's Department Detective Chris Wyatt searched the two cellphones and tablet computer that were in defendant's possession when he was arrested, as well as a computer found at defendant's home. On one of the phones and the computer, Wyatt found recordings that had been taken under women's skirts, or "upskirt videos." There were also videos or photos of defendant. Wyatt estimated there were approximately

1500 upskirt videos. Wyatt described the typical upskirt video defendant recorded: “It would be a video was turned on in a public place, following a specific person, ultimately, to get close enough to them to where the camera was turned up to where it could go under a dress and view a female’s private area.” The videos reflected defendant following women from 30 seconds to 20 minutes.

The jury was shown video footage supporting each of the five counts. The evidence supporting count 8 was video footage recorded on March 15, 2013, at a Big Lots store. The video begins with a shot of defendant’s shoes as he walks past a woman. The camera is then turned and aimed under the woman’s skirt. The victim’s feet and sandals are visible, as are her legs, her thighs, the black, ruffled bottom of her skirt or dress, a glimpse of the bottom of her purse, and her underwear, which are black, with a lace or scalloped edge.

Video footage for count 9 was recorded at a Target store in Lancaster on March 16, 2013, the same day defendant was arrested. In addition to recording under the woman’s skirt while apparently holding the phone, defendant also repeatedly placed the phone on the floor to record under the woman’s skirt, then retrieved the phone a few seconds later. Defendant briefly appeared in some of the videos as he knelt to retrieve the phone. The victim wears a dress with a white background and black and purple polka dots. Her shoes are visible, as are her pink underwear, her legs, her thighs, the bottom of her buttocks, and birthmarks or moles on those areas. The footage also shows the victim’s purse, the side of her body, her arms, and her hair.

The video footage for count 11 was recorded on an escalator in a train station on August 2, 2012. The video shows the victim's legs, her pink sneakers, a rainbow-striped skirt, and her bag, which is black with a distinctive pattern in red, green, purple, and blue writing. The victim stands next to another woman whose profile, hair, and glasses are captured on film. The video was recorded from behind the two women, from a raised position, rather than the floor of the escalator.

For count 14 there was video footage defendant recorded on the Hollywood Walk of Fame on August 17, 2012. The footage displays the victim's legs, arms, and back. Also visible are the victim's black dress, her green flat shoes, and her purse. Defendant's shoes, legs, and the bottom of his shirt are visible as he approaches the woman, then the camera is flipped, descends, and is pointed under the woman's skirt.

The video footage for count 15 was taken in or near Hollywood, on an escalator. The victim's legs, back, the back of her head, and a portion of the side of her face appear on the video. Her outfit or dress consists of a tan skirt, a gray blouse with white polka dots, and a black belt. As with the video related to count 11, the camera appears to be in raised position, rather than placed on the floor; the camera is also in constant motion, as if handheld.

The jury also saw recordings unrelated to the five counts being tried. One took place at a Starbucks in the Hollywood area. Defendant trained the camera on a woman wearing shorts that did not completely cover the bottom of her buttocks, and on the slightly transparent skirt of a second woman. The camera is then flipped up and pointed down, recording a shot of the woman's chest. Another short video records under the same woman's

skirt. Another was video footage from Walmart. The camera lingers on a woman in a black dress and her male companion; after several seconds, the camera is flipped, moved, and directed under the woman's skirt. A video from February 6, 2013, depicts defendant approaching a woman next to a car—his voice can be heard on the recording—as the camera is pointed at the bottom of her skirt.

The jury was also shown six short videos in which defendant followed a woman into a store and, while recording with a camera, asked if she was stealing. Posing as a store security agent, defendant directed the woman to lift up her shirt (thereby displaying the top of her buttocks), squat, and “spread” her buttocks. At one point during the incident, defendant put his hand in the back of the woman's pants, pulling at her clothing as if to see if anything was hidden. In one of the recordings, defendant can be heard saying: “I need to, yeah, pick ‘em up longer. Pick ‘em, put ‘em back down for me. Squat down for me. Nah, squat down for me, exactly how you are. I need, I need it how you are. All the way down for me. . . . Lift your shirt for me. Alright now, spread ‘em. Spread that right there so I can make sure nothing falls off. Spread it right there. Spread that for me, your cheeks . . . . Push your asshole. Spread that, did you hear me ma’am? Spread your cheeks for me. Oh. Oh . . . . Lift up, lift up. Lift yourself up.”

The jury found defendant guilty on all five counts. Taking into account the convictions from the prior trial, the trial court

sentenced defendant to a total prison term of 20 years and six months.<sup>2</sup>

## DISCUSSION

### I. Defendant Has Not Established Ineffective Assistance of Counsel

Defendant contends his counsel was ineffective because, in closing argument, counsel conceded the victims were “probably” identifiable. On the record before us, we find no ineffective assistance of counsel.

#### A. Background

In the appeal from the first trial in this matter, defendant argued there was insufficient evidence the victims at issue in five counts were “identifiable” within the meaning of section 647, subdivision (j)(2), and that the trial court erred in failing to instruct the jury on the meaning of “identifiable.” In resolving the first appeal, this court interpreted the term identifiable and concluded there was sufficient evidence for a jury to find the victims in the challenged counts were identifiable.<sup>3</sup> However, we

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<sup>2</sup> At the first trial, the jury convicted defendant on 12 counts of violations of section 647, subdivision (j)(2). The jury also found defendant guilty of one count of sexual battery by fraud (§ 243.4, subd. (c)), and one count of felony false imprisonment (§ 236). The trial court found true allegations that defendant had suffered one prior strike and had served a prior prison term within the meaning of section 667.5, subdivision (b). (*People v. Johnson*, *supra*, 234 Cal.App.4th at p. 1439.)

<sup>3</sup> We indicated “ ‘identifiable’ means that when all of the available evidence is considered, it is reasonably probable that *someone* could identify or recognize the victim. This includes the victim herself or himself. The People will prove the ‘identifiable

determined the trial court prejudicially erred by failing to define the term for the jury. (*People v. Johnson, supra*, 234 Cal.App.4th at p. 1436.)

During the second trial, defense counsel asked questions of witnesses on cross-examination related to defendant's positioning of his phone, and whether the phone could be seen. In closing arguments, the prosecutor argued at length that the victims were identifiable. Defense counsel began his argument by asserting there were large evidentiary gaps in the People's case. He continued:

"Now you've heard [the prosecutor's] closing. You heard that none of the ladies in these five counts were identified. However, were they identifiable? Could the subject of these videos, could they, at least, identify themselves? Probably. Is the requisite intent there? Obviously. But what is missing in the evidence? And [the prosecutor] acknowledged the weakness of his own case. He told you what's missing. The fact of the matter is he never once attempted to conceal what he was doing. The device was not concealed. And that is an element of these charges. It's the first element. The People have to prove to you beyond and to the exclusion of every reasonable doubt that the device was concealed. There's not one piece of evidence in this case that will show you that the device was concealed. Actually, the evidence shows that it was not."

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person' element by establishing that, when all of the evidence is considered, it is reasonably probable that someone, including the victim, could identify or recognize the person secretly recorded." (*People v. Johnson, supra*, 234 Cal.App.4th at p. 1441.)



Defense counsel then argued the evidence showing defendant held his phone in his hand while recording, and also that at times he put it on the floor, established he did not conceal the phone.<sup>4</sup>

### **B. Discussion**

Under section 647, subdivision (j)(2), it is disorderly conduct, a misdemeanor, to use “a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy.”

Defendant contends his counsel was incompetent for conceding the victims were “probably” identifiable. He argues the only disputable element of the section 647, subdivision (j)(2) charge was the identifiability of the victims, and, as this court

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<sup>4</sup> In rebuttal argument, the prosecutor argued the statute required a “‘concealed camcorder, motion picture camera, or photographic camera,’” and in this case the camera was concealed within a telephone. He also argued the phone could be “concealed” in plain view, in that defendant was concealing the phone behind him, and recording only when the victims were not paying attention. The prosecutor additionally contended the combination of the camera’s appearance and its placement established it was concealed: “[T]he appearance is the telephone, the placement of the item is his hand away from their viewpoint, hence it’s clearly concealed.”

noted in the prior appeal, the evidence of identifiability as to the challenged five counts was not overwhelming. Defendant further asserts defense counsel's argument that the camera was not concealed was unsupported by the facts or the law and was therefore frivolous. We disagree that the record establishes ineffective assistance of counsel.

“The constitutional standard for determining whether counsel has failed to provide adequate legal representation is by now well known: First, a defendant must show his or her counsel's performance was ‘deficient’ because counsel's ‘representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citation.] We will find prejudice when a defendant demonstrates a ‘reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.] ‘Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.’ [Citation.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

Counsel's decision to focus on one argument he or she finds most persuasive is a legitimate tactical choice. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1158-1159.) While in the first appeal this court indicated the evidence supporting some of the challenged counts presented a close case on identifiability, we also concluded there was sufficient evidence for the jury to determine the victims were identifiable. A reasonably competent, experienced criminal defense attorney could legitimately

conclude that, even if the question was close, the jury was highly likely to find against defendant on the identifiability issue. This was also the aspect of the case the prosecutor focused on, which may have led defense counsel to reasonably consider whether any arguments could be made on the other elements of the crime.

We do not agree it was frivolous to argue the People did not establish the camera was concealed. For several counts, the People did not have direct evidence showing how defendant was holding his camera phone when recording the victims.<sup>5</sup> Faced with few avenues of persuasive argument, defense counsel could make a reasonable tactical choice to concentrate on one element for which there was less evidence, in an attempt to convince the jury the People had not established defendant's guilt beyond a reasonable doubt.

Defendant contends his defense counsel could have argued the victims were not identifiable in addition to arguing there was no evidence the camera was concealed. While this is true, it does not follow that defense counsel was incompetent for not doing so. Acknowledging weaknesses in a case, abandoning arguments, or even conceding portions of a case to try to bolster credibility can be legitimate tactics. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.) While the first appeal and our resulting decision highlighted identifiability, defense counsel was not bound to argue the point upon retrial. Failure to argue one of several alternative theories is not objectively unreasonable as a matter of law. (*People v. Thomas* (1992) 2 Cal.4th 489, 531-532.) Further, the

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<sup>5</sup> Of course, the jury could permissibly infer from the behavior of the victims that defendant was in some fashion concealing the camera so they would not know he was recording, or attempting to record, upskirt or down-blouse images.

presentation of the evidence supporting the five challenged counts alone, without the evidence of the additional charged counts from the first trial, and bolstered by the prosecutor's specific arguments on identifiability, may have convinced defense counsel the jury was highly likely to find the People met their burden of proof on that element.

Defendant has not shown that there could be no satisfactory explanation for defense counsel's actions. (*People v. McDermott* (2002) 28 Cal.4th 946, 994; *People v. Palmer, supra*, 133 Cal.App.4th at pp. 1158-1159.) "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.) Choosing not to argue identifiability in favor of the "concealed" element was not deficient performance and did not amount to a complete failure to subject the People's case to meaningful adversarial testing or a breakdown in the adversarial process. (*U.S. v. Cronin* (1984) 466 U.S. 648, 659; *Strickland v. Washington* (1984) 466 U.S. 668, 696; *People v. McDermott, supra*, 28 Cal.4th at p. 991.)

Defense counsel's decision to acknowledge identifiability and focus solely on whether the camera was concealed could have been a tactical decision a reasonably competent, experienced criminal defense attorney would make. (*Yarborough v. Gentry, supra*, 540 U.S. at p. 8 ["[J]udicious selection of arguments for summation is a core exercise of defense counsel's discretion."].) On the record before us, we cannot conclude defense counsel failed to provide adequate legal representation.

## **II. The Trial Court Did Not Abuse its Discretion in Admitting Evidence of Uncharged Conduct**

Defendant contends the trial court abused its discretion by admitting recordings showing him committing sexual battery and false imprisonment. Defendant argues admission of the recordings violated Evidence Code section 352 because they were more prejudicial than probative. We find no abuse of discretion.

“ ‘If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant’s intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence “is ‘substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ (Evid. Code, § 352.)” [Citation.] “Rulings made under [Evidence Code sections 1101 and 352 . . .] are reviewed for an abuse of discretion. [Citation.]” [Citation.] “Under the abuse of discretion standard, ‘a trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” [Citation.] [Citation.]” (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

“ ‘ “In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’ ” [Citations.] [Citation.] “ “Undue prejudice” refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: “The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative

evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.” ’ ” [Citations.]’ [Citation.]” (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1276-1277.)

The sexual battery and false imprisonment recordings were probative on the issue of intent and common plan. The People were required to prove defendant acted “to arouse, appeal to, or gratify” his “lusts, passions, or sexual desires.” The jury could reasonably infer from the videos supporting the five charged counts that defendant’s intent in making the recordings was some form of sexual gratification. But the sexual battery videos offered more direct and explicit evidence of defendant’s sexual intent in recording his victims. Thus, although the videos depicted a different offense, they were highly probative with respect to the intent element of the section 647, subdivision (j)(2) charges. We further disagree that the sexual battery videos were *unduly* prejudicial, in light of their probative value. Defendant’s conduct in the sexual battery and false imprisonment videos was more active and overt than in the other videos. Still, the videos were brief and the jury was instructed as to the limited purpose for which it could consider the evidence. (*People v. Rogers, supra*, 57 Cal.4th at p. 332.) The trial court could reasonably conclude the sexual battery and false imprisonment videos did not depict behavior so inflammatory that viewing them would tend to cause the jury to decide the case on an improper basis. We therefore also reject defendant’s argument that his due process right to a fair trial was violated by admission of the challenged videos. (*Ibid.*; *People v. Weaver* (2001) 26 Cal.4th 876, 934.)

**DISPOSITION**

The trial court judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.